Supreme Court, U.S.
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In the
Supreme Court of the United States
October Term 1997

ATHI NARAYAN

Petitioner,

v.

ST. CHARLES HOSPITAL

Respondent.

Petition for Writ of Certiorari
To The United States Court of
Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

John G. Rust
4628 Lewis
Toledo OH 43612
(419) 476-0347
Attorney for Petitioner

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1. QUESTION PRESENTED FOR REVIEW

1. Is it a denial of Petitioner's due process rights to a trial by jury under the Sixth Amendment to the United States Constitution for a Court to enter a summary judgment dismissal against Plaintiff's (Petitioner) Complaint in circumstances where there are substantial factual issues and factual differences in the evidence as to essential matters of the case filed under Title VII, U.S.C. 2000(e)(2) (and other claims).

2. LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

Petitioner (Plaintiff) - Dr. Athi Narayan, M.D.

Respondent (Defendant) - St. Charles Hospital

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AMENDMENT TO THE UNITED STATES CONSTITUTION FOR A COURT TO ENTER A SUMMARY JUDGMENT DISMISSAL AGAINST PLAINTIFF'S (PETITIONER) COMPLAINT IN CIRCUMSTANCES WHERE THERE ARE SUBSTANTIAL FACTUAL ISSUES AND FACTUAL DIFFERENCES IN THE EVIDENCE AS TO ESSENTIAL MATTERS OF THE CASE FILED UNDER TITLE VII, U.S.C. 2000(e)(2) (AND OTHER CLAIMS).

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4. OPINIONS BELOW

(a) Opinion and Order of U. S. District Court (Northern District of Ohio, Western Division), Case No. 3:95CV7366, dated 12/20/96 (See Appendix pp 3-33)

(b) Opinion of U. S. Court of Appeals (Sixth Circuit) in Case No. 97-3042, dated 07/02/98 (See Appendix pp 1-2)

In The

SUPREME COURT OF THE UNITED STATES

October, 1997 Term

ATHI NARAYAN

Petitioner,

vs.

ST. CHARLES HOSPITAL

Respondent.

On Petition for a Writ of Certiorari

5. STATEMENT OF JURISDICTION

(A) The date of the judgment of the U. S. Court of Appeals (Sixth Circuit) was July 2, 1998

(B) Jurisdiction is based and requested under 28 U.S.C. 1954, etc.

6. CONSTITUTIONAL PROVISIONS, STATUTES & RULES INVOLVED

(a) Sixth Amendment to United States Constitution
(See Appendix p. 38)

(b) 42 U.S.C. 2000(e)(2)
(See Appendix p. 37)

(c) Federal Civil Rule 56(C)
(See Appendix p. 36)

7. STATEMENT OF THE CASE

Petitioner, Dr. Athi Narayan is a physician, a native of India, and a follower of the Hindu faith, and a specialist in neonatology (a highly-specialized area of treating new-born babies that are ill - a practice of which, for all realistic purposes, is limited in-house hospital practice.

From 1977-1987, Petitioner was employed as a neonatologist by the St. Paul Ramsey Hospital in St. Paul, Minnesota of Neonatology, earning $150,000 to 160,000 per year. His family was well-settled in the Twin Cities area, with his wife employed as an accountant, with his sons enrolled in high school in St. Paul.

On or about 1987, Petitioner was contacted by Respondent. In this regard, Respondent had no prior or real experience with a neonatology department and had to basically start from scratch to properly establish same.

When Petitioner was so contacted, he was not particularly eager to leave his position and situation at the

St. Paul Ramsey Hospital. One of the more critical aspects of the overtures made by Respondent to Petitioner was the promise and assurance of job security for Respondent with the further assurance of Respondent that Petitioner's position at St. Charles, if accepted, would be for the remainder of Petitioner's working career (unless a problem with Petitioner's medical competence arose, which never did in this situation).

After an initial rebuff by Petitioner, Respondent made yet another offer to Petitioner with a guaranteed income contract and a service contract as Director. These two separate contracts were for an initial period of three years, to be renewed automatically at the end of each term. Petitioner signed these contracts only after explicitly indicating to Respondent's representatives that he wanted an assurance that he would be able to work for Respondent for the remainder of his working career.

At this time, Petitioner was assured by Respondent

that Petitioner would be able to work up to his retirement.

After the contracts were signed by Petitioner, he resigned his established position, and his wife also resigned her position and his children had to change schools for the move to Toledo. Moreover, Petitioner sold his home in Minnesota and purchased a new home in Toledo.

Once Petitioner started his new position, he immediately commenced efforts to build the department of neonatology. These efforts included:

1. Organizing an administrative organization
2. Developing and training personnel
3. Developing a training program
4. Developing schedules
5. Developing a plan to attain Level II status for the neonatology department
6. Developing a coordination program with the Respondent's sister hospitals in Lima, Tiffin, Fostoria and Mercy Hospital in Toledo
7. Upgrading the medical capability of the neonatology department
8. Assisting in the education of resident

physicians at Mercy Hospital and neonatology service at Mercy Hospital

9. Coordinating physician education in obstetrics, pediatrics and family practice
10. Marketing work
11. Other areas, including establishing the public education programs.

In addition to the foregoing, Petitioner established a sleep apnea program at Respondent's Hospital to help understand infant crib death and sleep apnea. This program included many hours of additional uncompensated time over that contemplated by his contract, and this program became a successful institution at the Respondent's hospital and still exists today. In short, the Respondent's department of neonatology grew and developed under Petitioner.

Additionally, when the original three year contract period expired, Respondent tendered a second five year contract for Respondent's continued employment with Respondent, and Respondent at such time indicated

continued satisfaction with Dr. Narayan's performance. Once again, it was stated by Respondent's representatives to Petitioner just before this five year contract extension in 1991, that the length of the Petitioner's tenure would be for the remainder of his working career, but that Respondent was limited to written contracts of a five year term because of bonding requirements and could be assured of continued renewals of these contracts. Based on this assurance in 1991, Petitioner again signed another five year contract with Respondent.

During this second contract period, Petitioner accomplished the following:

1. Attained a Level II status for obstetrics and neonatology;
2. Helped a second neonatologist (Dr. Byrne) to get established at St. Charles in spite of opposition and concern about him by medical staff physicians who had concerns about him during his brief tenure at Riverside Hospital (3-4 months);
3. Expanded the sleep apnea program to cover patients from St. Vincent's Hospital;

4. Formalized several committees pertaining to perinatology and neonatology;
5. Established a transport team to transfer patients from the network hospitals to St. Charles Hospital;
6. Expanded educational activities to cover more physicians in related medical areas.

In 1992, during the second contract extension, Respondent hired Dr. Paul Byrne as the Assistant Neonatologist, under Petitioner. Dr. Byrne is a Caucasian and a Catholic. Differences occurred between Petitioner and Dr. Byrne over the care by Dr. Byrne of a terminally ill, brain-dead (comatose) child. This concern was initiated by the Petitioner over the concern that the care that was given was not medically or ethically proper. (i.e. fluid reduction to child and lack of communication to parents). As a result, Petitioner complained in the matter and encountered a backlash from the Respondent's administration in the process. By reason of these concerns, some officers at St. Charles appeared to side

with Dr. Byrne and Petitioner maintained that certain of the higher echelon officials sided with Dr. Byrne primarily by reason of the religious issues involved.

Approximately on or about May 13, 1994, just before the termination date of Petitioner's second written dual contracts, Petitioner was informed by an interview with Respondent's then existing C.E.O. that his tenure with Respondent would be terminated at the end of the fourth year. Nothing in the notice of termination was said about an adverse performance or negative problems, with no complaints about his performance having been received or warnings about department administration problems, and/or departmental financial problems or otherwise.

Obviously, when Petitioner received this notice, consternation struck and he immediately sought out reasons why he was being terminated, but did not receive direct or specific answers, but essentially at first encountered an impenetrable wall of silence. No time

previously did Respondent state to Petitioner that finances were a problem, but upon continued probing of Respondent by Petitioner's attorney and Petitioner there were vague insinuations of cost problems in the department.

In response to these statements about financial problems, Petitioner made several inquiries and overtures about working with Respondent at a reduced income rate. Petitioner offered salary reductions extending down to approximately one-half of his then existing compensation amount, along with several part-time programs all calling for salary reductions. Respondent remained silent on some overtures, rejected others, but never made counteroffers and essentially rejected every offer to discuss alternatives.

In regard to the financial concerns, there was an array of factors that were of significant concern at the time of Respondent's decision to terminate Petitioner's

employment. Some of these concerns, perhaps not being all of them, were addressed as stated.

In the final months of Petitioner's tenure with Respondent, it decided to hire a new neonatologist and to replace Petitioner. When this position was advertised, Petitioner was asked to submit an application as if he were a new applicant, even though he was still working at St. Charles Hospital. He did so submit an application yet nothing developed from his application and Respondent eventually decided to sub-contract with St. Vincent's Neonatology Group for neonatology coverage at a cost of $125,000.00. It is important to note in this respect that one of the proposals made to Respondent by Petitioner called for an annual fee of $125,000.00 to be paid to Dr. Narayan for neonatologist coverage purposes - yet there was no response given by Respondent to Petitioner's proposal. (This amount turned out to be the same amount Respondent is paying for the services of the St. Vincent

Hospital Neonatology Group for neonatology coverage — which does not even cover the ventilation of infants as did Dr. Narayan's proposal).

Because of the impasse that resulted, and after many attempts at resolution, the subject lawsuit was filed in the United States District Court (Northern District of Ohio, Western Division, Case No. 3:95CV7366. Summary judgment was granted to Defendant (Respondent) on December 20, 1996 dismissing Plaintiff's (Petitioner's) Complaint and Petitioner appealed to the U. S. Court of Appeal (Sixth Circuit), which denied Petitioner's Appeal.

8. REASONS FOR GRANTING THE WRIT OF CERTIORARI - ARGUMENT

I.

IS IT A DENIAL OF PETITIONER'S DUE PROCESS RIGHTS TO A TRIAL BY JURY UNDER THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION FOR A COURT TO ENTER A SUMMARY JUDGMENT DISMISSAL AGAINST PLAINTIFF'S (PETITIONER) COMPLAINT IN CIRCUMSTANCES WHERE THERE ARE SUBSTANTIAL FACTUAL ISSUES AND FACTUAL DIFFERENCES IN THE EVIDENCE AS TO ESSENTIAL MATTERS OF THE CASE FILED UNDER TITLE VII, U.S.C. 2000(e)(2) (AND OTHER CLAIMS).

1. General Legal Parameters Relative to Summary Judgment:

In any motion for summary judgment, the basic considerations must rise from the parameters of Federal Rules of Civil Procedure, Rule 56(C), which states in part as follows:

> ". . . A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only therefrom, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in his favor. . ."

It is thus clear that in any motion for summary judgment, there must be an absence of a genuine issue of fact (as to material issues) and that a moving party is entitled to a judgment as a matter of law from such facts. In this regard, a motion for summary judgment requires the court to construe the facts (pertinent to such motion) most strongly against the party advancing the motion. In general, summary judgment is considered improper whenever the facts, as to key case elements, reveal a disparity between the versions of the respective parties. Alternatively stated, if a factual dispute exists as to essential issues, summary judgment is considered not proper. (See generally Alladin Plastics, Inc. v. Jerrold

Stephan Co.; CCA 9, 362 F2d 532.

2. **Relevant Substantive Law**

42 U.S.C. 2000e-2 provides in relevant part as follows:

> Employers. It shall be unlawful employment practice for an employer:
> 1. to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, condition, or privileges of employment because of such individual's race, color, religion, sex, or national origin; or
> 2. to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

This section forms the main basis of the Petitioner's first two causes of action.

In order for Petitioner to establish a prima facie case of racial discrimination (or religious discrimination) under 42 U.S.C. 2000(e)(2) he must establish certain factors:

a. that Petitioner is in a protected category or class,

b. That Petitioner was otherwise qualified for the position,

c. that Petitioner was replaced by a person outside the protected class or Petitioner sustained an adverse employment impact, which gave rise to an inference of discrimination. (See Texas Department of Community Affairs v. Burdine, 450 U.S. 792.)

Once Petitioner in a given case has demonstrated the above factors, he has established a prima facie case and the burden falls upon the Respondent to demonstrate that its actions were not basically rationalized by mere race or religion or national origin.

Essential facts in this case have been disputed. Upon termination of Petitioner's contract as of May 1995,

he was almost immediately replaced by Dr. Byrne, a Caucasian, Catholic and United States native (Petitioner being in a protected class by reason of race, religion, nationality, as stated above) as the Chief neonatologist and Neonatology Department Head, and assumed the responsibilities of such function. Respondent denied that Petitioner was so replaced and provided evidence alleging that no such replacement occurred contrary to Petitioner's position.

There was no issue as to Petitioner being otherwise qualified as a neonatologist and as the administrative head of Respondent's Department of Neonatology. At issue was whether Dr. Byrne assumed all the medical and administrative responsibilities of head of the Department of Neonatology.

It was also the position of the Petitioner in this matter that the Respondent has not provided proof of a justifiable basis for replacing Petitioner by Dr. Byrne, i.e.

the reason was pretextual and is not for reason as stated.

In this latter respect, as to the applicable legal parameters as a primary consideration, it is significant to note that at least two types of discrimination have been recognized by the courts: disparate treatment and disparate impact. As explained in International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335-336, n.15 (1977), disparate treatment arises when the employer simply treats a person in the protected class less favorable on the grounds of race, color, religion, or national origin. Disparate impact cases arise when an employer's practices, though facially neutral, fall more harshly on one group than another and cannot be explained away by business necessity. Id

In a case of disparate treatment, which the Supreme Court in Teamsters described as *the most obvious evil congress had in mind when it enacted Title VII.* Id. In order to prevail in such a case, an aggrieved

employee must prove discriminatory intent. This may be accomplished by presenting either direct or indirect evidence of discrimination. Without direct evidence of discrimination intent, indirect proof of discrimination will suffice. [Mauzy v. Kelly Services, Inc., 75 Ohio St. 3d 578 (1996)], quoting Kohmescher v. Kroger Co., 61 Ohio St. 3d 501, 505 (1991). Indirect evidence may be presented simply because direct evidence of intentional discrimination rarely presents itself; *In this respect, there will seldom be 'eyewitness' testimony as to the employer's mental processes* United States Postal Service Bd. of Governors v. Aikins, 460 U.S. 711, 716.

Id., 460 U.S. 711, quoting Eddington v. Fitzmaurice, 29 Ch. Div. 459, 473. Accordingly, it is well settled that proof of discriminatory motive *can in some situations be inferred from the mere fact of differences in treatment*. Teamsters, 431 U.S. 324, 335, n. 15, the usual approach in this respect involves the model of proof established in

Texas Dept. Of Community Affairs v. Burdine, 459 U.S. 792, 802, n. 13 (1973). Accordingly, the employee must first establish a prima facie case of discrimination, as discussed above. The employer then has the opportunity to demonstrate adequately that it had a legitimate reason for its actions. See Burdine, 450 U.S. at 254, n. 7; Furnco Construction Co. v. Waters, 438 U.S. 567, 577 (1978). At this point, the employee must prove these reasons were pretextual.

3. **The Pretext Issue**

Respondent had asserted that Petitioner cannot adduce sufficient proof that his termination was pretextual (i.e. a reason without proper basis). Respondent contends that it had financial problems with the Department of Neonatology as the basis for terminating Petitioner. A review of the overall aspects of the Respondent's department and the Defendant hospital is essential in this light.

Respondent alleged that the Petitioner's salary was too high compared to the other neonatologists and that it had no choice but to discontinue Petitioner's services, in order to save overall costs in operating the Department of Neonatology. Petitioner maintains that there is more than just compelling evidence to sustain the existence of pretext on the part of Defendant in this regard. Generally, there were several aspects that yield strong evidence of such pretext, to wit:

a. The fact that many other departments at St. Charles Hospital had lost money - some at even greater rates than that of the neonatology department (if in fact the Neonatology Department lost money) and department heads in these departments who were white, Christian, Caucasians were not terminated.

a. The fact that in effect the Department of Neonatology did not lose money but had a positive impact from the services and monetary input it provided to other

departments.

b. The fact the Petitioner had brought in more money than Dr. Byrne overall for the Department of Neonatology.

c. The fact that when Respondent made its determination that the neonatology department was losing money. Petitioner made several offers to lower his income in order to help the Respondent keep costs down - one of the offers was to reduce to $125,000 his annual base compensation along with other financial aspects. (Which ultimately matched exactly the additional amount Respondent is presently paying to St. Vincent's to substitute and cover for Dr. Byrne.)

d. The fact that between years four and five of the second contract. Petitioner through his counsel made numerous offers to work out a reduced financial package to help the financial position of Respondent's hospital - none of which were ever responded to in a

positive way with counter proposals or to otherwise by Respondent. Indeed, the Respondent hospital just simply rejected every proposal or meeting without suggesting modifications or counter-proposals.

e. The fact that the Department of Neonatology losses (if any) were diminishing substantially from 1990 to 1995 while other department losses at Respondent were greater and increasing at a greater rate than the Department of Neonatology.

f. The fact that Petitioner's service contract with the Department of Neonatology was only $75,000 per annum as the Director of the Department of Neonatology and that he proposed to eliminate this service contract.

g. The fact that the Respondent hospital made other statements to Petitioner why he was being terminated.

h. The fact that the Respondent Hospital

spent close to $1,000,000 in 1995-1996 to remodel the neonatology and obstetrics departments at Defendant's hospital just immediately after it terminated Petitioner.

Each of these aspects will be discussed in specific detail.

(a) The History Of Losses in the Department

Respondent had stated the Neonatology Department had a history of losses even before Dr. Narayan came to St. Charles. The history shows that the profit and loss figures for the Department of Neonatology, among other of Respondent's departments, from 1985 to 1995, and for each of these 11 years there were alleged losses in the Department of Neonatology. Petitioner maintains that Respondent was aware of these loss factors from its own yearly report and it had to know if this alleged loss trend existed. Yet in face of the alleged losses in 1987 and 1988, Respondent elected to bring Petitioner to Toledo to work at its hospital. While full well knowing

this aspect, Respondent purposely and intentionally lured Petitioner to come to Toledo and guaranteed him $225,000 per year. Obviously, this gives rise to an estoppel against Respondent's financial claims as a basis to terminate Petitioner. However, it is also noted that these losses diminished substantially and started to become profitable (around 1994, 1995) for the Neonatology Department. What is more problematical is that Respondent decided to hire yet another neonatologist to add to these purported elevated costs factors.

(b) The Fact that Other Departments at Respondent Lost Money

Respondent had many departments, such as surgery, obstetrics, day care, etc. that traditionally lost money. According to the affidavit testimony of Mr. Harris, these "Loss" departments provide essential services to allow other departments to thrive profitably because of referrals. Moreover some of these "Loss" departments

(i.e. surgery) sustained heavier losses than those of neonatology, yet no efforts were made to terminate physicians in such departments.

Most significant in this regard is that for the pertinent years 1994 to 1995, St. Charles reaped a profit of approximately $3,000,000 on gross income of over $25,000,000 and neonatology finances were improving No way can it be expressed that Respondent had to make deep financial cuts to remain financially healthy in view of such financial situations.

(c) The Referral of Indirect Fees from the Department of Neonatology

Respondent has several departments that are indirect support departments. The revenue of these support departments depend entirely on referrals from the operational departments, such as Neonatology. Examples of such support departments at St. Charles include the laboratory, pharmacy, etc. The Department of

Neonatology contributed a substantial sum to these support departments during the years 1988 to 1995 and helped their profitability.

(d) The fact that Petitioner Generated More Income than Dr. Byrne

Respondent's position that it was more feasible to retain Dr. Byrne over Petitioner because of his lower salary ($183,000 compared to $225,000) was not substantiated by the circumstances.

(e) The Factor of the Financial Proposals Made by Petitioner

Petitioner made approximately five proposals to Respondent once he was told of the intent to terminate his service, as directed through his attorney or otherwise. These proposals addressed possible attempts to resolve the alleged loss situation. One called for Petitioner to work part-time for $125,000 per year, an approximate 40-50% reduction of income. Most disconcerting was that

Respondent refused to discuss the proposals or to make counter-proposals that would have proved a viable and effective basis for reduction of the costs in the Department of Neonatology. This adds extremely strong support to the conclusion that Respondent's alleged financial loss (as a basis) were clearly pretextual. This latter conclusion became even more undeniable when one further considers the fact that Respondent (after notice to Petitioner he was being terminated) then advertised for a new neonatologist to replace Petitioner at an approximate salary of $165,000 (and even after Respondent was made aware of Petitioner's annual salary proposals at the $125,000 range)

This latter aspects leads more solidly to the incredibility of Respondent's position, as further aggravated when Respondent ultimately contracted with St. Vincent's Hospital to have their neonatologist cover for Dr. Byrne (Dr. Narayan's replacement) for the amount of $125,000 annually, the same amount that Petitioner

already proposed for his reduced salary.

(f) The Factor that Respondent spent Approximately $1,000,000 to remodel the Department of Neonatology

Another factor that erodes the credibility of Respondent's claim that finances formed the primary basis for Petitioner's termination was the project undertaken by Respondent in 1995 and completed in 1996. In particular, Respondent (with planning started in 1994), consummated a remodeling project in the departments of neonatology and obstetrics at an overall cost of almost $1,000,000.00. It is inconceivable that Defendant's financial circumstances in the Department of Neonatology would be so diminished so as to relatively justify spending approximately $1,000,000.00 in the neonatology and obstetrics area for remodeling.

Thus, in view of the foregoing aspects, Respondent's financial concerns (in the Department of Neonatology) were clearly of not such a nature as to be

realistic - particular in the context and rationale of the discharge of Petitioner. By reason of this latter aspect and by reason of the fact that Petitioner had established that:

a. he was in the protected class; and
b. was otherwise qualified for the position; and
c. was in fact replaced by someone outside the protected class.

Respondent should not have prevailed on this claim and thus Respondent's summary judgment motion on this aspect should have been denied.

It is to be noted that Petitioner's Complaint in the United States District Court also comprised additional counts that involved matters of implied contract, unjust enrichment, and antitrust violations. The implied contract matters involved promises made to Petitioner (as stated above) that his contract would be automatically renewed at the end of each term. In this respect, Petitioner provided evidence to the effect that such assurances were

made and that he relied on these representations in continuing his relationship with Respondent. Respondent denied making such assurances. Moreover, as stated above, Respondent denied the evidence presented by the Petitioner to the effect that Petitioner was replaced by Dr. Byrnes (as Department Head) when he was terminated. As to the civil rights claims and implied contract matters, there were several other areas where differences arose between the factual evidence presented by Petitioner and Respondent.

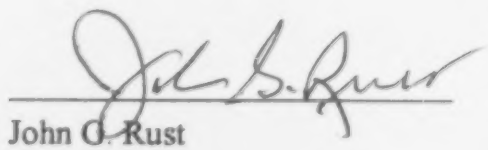
At the trial court level, as well as in the United States Court of Appeals, Petitioner raised issues of whether the evidentiary differences between Petitioner and Respondent justified summary judgment in the subject case (under the purview of Federal Civil Rule 56). Extending this issue further, it is Petitioner's concern that summary judgment under the facts and status the subject case reaches into and violates Petitioner's due process

rights and jury trial rights (as subsumed under the Sixth Amendment to the United States Constitution). Petitioner contends that with the heavy emphasis on the use of summary judgment proceedings in civil cases, there are instances where summary judgment procedures, as implemented by the courts transcends the established constraints under Federal Civil Rule 56. It is the position of Petitioner that there is a substantial need for review of the summary judgment procedures, as presently handled in order to provide proper guidance for ruling upon such motions (in light of the potential conflicts with the due process and jury trial rights under the Sixth Amendment). This case, by the nature of the summary judgment process herein, provides an optimal vehicle for review of this issue.

John G. Rust
Attorney for Petitioner
4628 Lewis
Toledo, Ohio 43612
(419) 476-0347

2. CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Petition was mailed to Rolf H. Scheidel, Attorney for Respondent, 1000 Jackson Street, Toledo, Ohio, 43624, this 30 day of November, 1998.



John O. Rust
Attorney for Petitioner
4628 Lewis
Toledo, Ohio 43612
(419) 476-0347

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NO.

SUPREME COURT OF THE UNITED STATES

ATHI NARAYAN

Petitioner,

v.

ST. CHARLES HOSPITAL

Respondent.

Petition for Writ of Certiorari
To The United States Court of
Appeals for the Sixth Circuit

APPENDIX

John G. Rust
4628 Lewis
Toledo OH 43612
(419) 476-0347
Attorney for Petitioner

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APPENDIX

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1. ORDER, U. S. COURT OF APPEALS (SIXTH CIRCUIT), DATED JULY 2, 1998

NOT RECOMMENDED FOR PUBLICATION

No. 97-3042

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ATHI NARAYAN, M.D.,	)	
Plaintiff-Appellant.	)	**ON APPEAL FROM THE UNITED STATES**
vs.	)	**DISTRICT COURT FOR THE NORTHERN**
ST. CHARLES HOSPITAL,	)	**DISTRICT OF OHIO**
Defendant-Appellee	)	

BEFORE: KENNEDY, BATCHELDER, Circuit Judges, and HULL, District Judge*

Per Curiam: Plaintiff-Appellant Athi Narayan, M.D., an Indian-born neonatologist of the Hindu religion, appeals the district court's order granting summary judgment to his former employer, St. Charles Hospital and dismissing his complaint claiming numerous civil rights, due process and state law violations. After careful review of the record and the district court's order, we conclude that that order thoroughly and accurately sets out both the undisputed facts and the governing law. Because the issuance of a full opinion would serve no jurisprudential purpose and would be duplicative, we AFFIRM the grant of summary judgment on the basis of the district court's well-reasoned opinion and order.

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* Hon. Thomas G. Hull, United States District Court for the Eastern District of Tennessee, sitting by designation.

2. OPINION AND ORDER, U.S. DISTRICT COURT (NORTHERN DISTRICT OF OHIO, WESTERN DIVISION), CASE NO. 3:95CV7366, DATED DECEMBER 20, 1996

[1]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Athi Narayan, M.D.,

Plaintiff Case No. 3:95-CV7366

vs.

St. Charles Hospital,

Defendant **OPINION AND ORDER**

POTTER, J.:

This action is before the Court on defendant's motion for summary judgment, plaintiff's amended opposition, defendant's reply and plaintiff's surreply. In

his complaint, plaintiff alleges numerous causes of action. The first four causes of action allege civil rights claims for discrimination based upon race, national origin, and religion in violation of 42 U.S.C. Sections 1981, 1983, and 2000e. Plaintiff's fourth cause of action also alleges a denial of due process in violation of Section 1983. Plaintiff further alleges a breach of oral representations concerning employment, promissory estoppel, breach of contract, unjust enrichment, fraud, defamation, and a violation of the federal antitrust laws. Defendant moves for summary judgment on each count.

> Under the Federal Rules of Civil Procedure, summary judgment is proper only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The Supreme Court has recently stated that the inquiry is "whether the evidence presents a

> sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson v. Liberty Lobby, Inc., 106 S. Ct. 2505, 2512 (1986) . . . In reviewing a motion for summary judgment, however, all inferences "'must be viewed in the light most favorable to the party opposing the motion.'" See Matsushita Elec. Indus. Co v. Zenith Radio Corp., 106 S. Ct. 1348, 1356-57 (1986) (quoting United States v. Diebold, Inc., 369 U.S. 654, 655 (1962).

Ralph Shrader, Inc. v. Diamond International Corp., 833 F. 2d 1210, 1213 (6th Cir. 1987).

> Matsushita demands only that the nonmoving party's inferences be reasonable in order to reach the jury, a requirement that was not invented, but merely articulated in that decision. If the [nonmoving party's] theory is . . . senseless, no reasonable jury could find in its favor, and summary judgment should be granted.

Eastman Kodak Co. v. Image Technical Servs., Inc., 112

S. Ct. 2072, 2083 (1992) (footnote omitted).

The party moving for summary judgment "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits if any' which [he] believes demonstrate the absence of a genuine issue of material fact." Celotex Corp v. Catrett, 477 U.S. 317, 323 (1986). The substantive law of the case identifies which

[3]

facts are material. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Therefore, only disputes of facts affecting the outcome of the suit under the applicable substantive law will preclude the entry of summary judgment. Id. A moving party may discharge its burden "by 'showing' - that is, pointing out to the district court -- that there is an absence of evidence to support the

nonmoving party's case." Celotex, 477 U.S. at 324-325. Where the moving party has met its initial burden, the adverse party "must set forth specific facts showing that there is a genuine issue for trial." Anderson, 477 U.S. at 250.

> [W]here the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the "pleadings, depositions, answers to interrogatories, and admissions on file." . . . Rule 56(e) therefore requires the nonmoving party to go beyond the pleading and by her own affidavits, or by the "depositions, answers to interrogatories, and admissions on file." designate "specific facts showing that there is a genuine issue for trial."

Celotex, 477 U.S. at 324.

The undisputed evidence indicates that plaintiff is a neonatologist, born in India and of the Hindu religion. Defendant is St. Charles Hospital (Hospital or defendant),

a private, non-profit corporation. In December, 1987, after being heavily recruited by defendant, plaintiff accepted a written offer to provide neonatal services at the Hospital. The offer stated that "we will develop a contract outlining our specific obligations to each other" and that they would

[4]

"develop the contract with a three year time frame in mind." Defendant's Exhibit A. The offer set forth the specific monetary amount offered of up to $239,000 per year, plus office space and secretarial support. In December, 1987, the parties executed two contracts, a Service Agreement and a Guarantee Agreement, each with a term of three years and each containing an integration clause providing that it contained the entire agreement between the parties which superseded all prior written and oral statements made with respect thereto. Defendant's Exhibits C and D. In addition, each contract provided that

the Hospital could terminate the agreement prior to expiration of three years for cause as set forth in the agreement. See Defendant's Exhibits C Paragraph 16, Exhibit D Paragraph 5.

At the time plaintiff entered into the agreement with defendant, he and his family were well established in Minnesota. He was working as Co-Director of Neonatology at a hospital in St. Paul, Minnesota and was a full faculty member with the Department of Pediatrics at the University of Minnesota. He resigned both positions in order to work at defendant Hospital.

On September 14, 1990, the parties executed a new contract, effective May 16, 1991, entitled "Service Agreement." Defendant's Exhibit E. This contract was for a term of five years and provided, in addition to termination for causes listed in the agreement, that "either party may terminate this Agreement without penalty or cause (I) effective at the end of either the second year of

its term or at the end of the fourth year of its term, by giving the other party no less than six (6) months advance written notice of

[5]

such termination. Id., at Paragraph 15. Under the Agreement, plaintiff was to be compensated in the amount of $249,000 per year. Plaintiff was represented by counsel when this contract was negotiated and executed. His attorney told him that the contract could be terminated without cause. Plaintiff's Depo. at 75.

In August, 1991, defendant entered into a written contract with Dr. Paul Byrne. Exhibit A attached to Defendant's Exhibit F. Dr. Byrne is a white, Catholic neonatologist. Under that agreement, Dr. Byrne was to provide neonatology services at the Hospital and consulting services which included assisting the Hospital

in establishing a Level II neonatal nursery unit[1] and working with officials of the various department of the state and local governments who may be involved in licensing, regulating or approving the operation of a Level II neonatal nursery unit. Id. at Paragraph 1(a) and (e). The contract was for a term of one year and provided for compensation in the total amount of $176,000. Id. at Paragraph 2(c). Dr. Byrne continues to provide services for the Hospital on a month-to-month basis terminable by either party upon thirty days notice.

On May 13, 1994, plaintiff met with Cathleen Nelson, the then Vice President of Operations at the Hospital, to discuss his concerns regarding Dr. Byrne's management of a comatose infant in the nursery. During that meeting, Ms. Nelson informed plaintiff of the decision

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[1] A level II status for a neonatal unit is a state certification to permit greater levels of care for sick newborn infants.

to terminate his

[6]

contract effective May 16, 1995. Ms. Nelson testified in her deposition that this decision was made several months earlier during budget discussions. Nelson Dep. at 71. Defendant's intent to terminate the contract was confirmed in a letter dated June 7, 1994.

After receiving notice of termination, plaintiff, both individually and through his counsel, attempted to negotiate a new contract. A number of proposals were made and either rejected or not responded to by defendant. Just prior to plaintiff's termination date of May 16, 1995 and after advertising for the position, defendant entered into a contract with the neonatology group at St. Vincent Medical Center to provide coverage for Dr. Byrne when he is unavailable. This contract provides for payment to the neonatologist group at a reduced rate of compensation in the amount of $125,000. The position of

Medical Director of the Neonatology Unit was eliminated at the Hospital.

Plaintiff's civil rights claims set forth in his first four causes of action allege discrimination in violation of Title VII and Section 1981, and a denial of his First Amendment and due process rights in violation of Section 1983.[2] The Court

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2 With respect to his fourth cause of action, plaintiff appears to argue a state claim of wrongful discharge in violation of public policy prohibiting an employer from discharging an employee who reports concerns of ethical problems relating to another physician's treatment of a patient. See Amended Response of Plaintiff at 26-28. Although a "complaint need not set down in detail all the particularities of a plaintiff's claim," it must, "give the defendant 'fair notice of what the plaintiff's claim is and the grounds upon which it rests.'" Lillard v. Shelby County Bd. of Educ., 76 F. 3d 716, 726 (6th Cir. 1996), citing Gazette v. City of Pontiac, 41 F.3d 1061, 1064 (6th Cir. 1994). Plaintiff alleges that jurisdiction of the Court is, in his fourth cause of action, "invoked pursuant to 42 U.S.C. 1983 and 1981 and is founded on Title 28 U.S.C. Section 1343(3) and (4)." Complaint Paragraph 26. He then alleges that defendant arbitrarily terminated him without a pretermination hearing and for the purpose of

first addresses plaintiff's discrimination claims under Title VII and Section 1981 for which the same evidentiary analysis is used in ruling on a motion for summary judgment.[3] See Richmond v. Board of Regents of Univ. of Minnesota, 957 F 2d 595, 598 (8th Cir. 1992). Absent direct evidence of discrimination, a plaintiff establishes a prima facie case by producing evidence showing: (1) he is

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retaliating against him for his exercise of his right of free speech. Id. at Paragraph 27. He further alleges that these actions resulted in discrimination against plaintiff because of his race, color and religion; deprivation of rights, privileges and immunities provided by the United States Constitution; deprivation of his liberty and property without due process of law; and interference with plaintiff's employment contract in violation of 42 U.S.C. Section 1981. Id. at Paragraphs 27-28, 30. Because none of these allegations give notice to defendant of a state claim of wrongful discharge in violation of public policy, the Court will not address this argument.

3 As defendant did not argue otherwise, the court will assume for purposes of this motion that plaintiff is an employee of defendant, notwithstanding the independent contractor provision in his contract with defendant.

a member of a protected class; (2) he was qualified for the job and, when plaintiff claims that he was discriminatorily denied a position, that he applied for that position; (3) he suffered an adverse employment decision; and (4) a person outside of the protected class either replaced him or was given the position for which he applied. See

[8]

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). Under a disparate treatment theory, the fourth element of the prima facie case is satisfied by showing that a similarly situated non-protected person was treated better. See Mitchell v. Toledo Hospital, 964 F. 2d 577, 582-83 (6th Cir. 1992).

In the case sub judice, plaintiff does not argue the existence of direct evidence of discrimination. Rather, plaintiff argues that he has produced evidence demonstrating a prima facie case of discrimination and that the legitimate business reasons stated by defendant are a

pretext. It is undisputed that plaintiff has satisfied the first three elements of a prima facie case of discriminatory discharge and failure to hire (or negotiate a new contract). However, plaintiff has failed to demonstrate that a non-protected person replaced him or was given a position which he sought.

Plaintiff argues that he was replaced by Dr. Byrne as Medical Director of the Neonatology Unit; however, Dr. Byrne was hired nearly four years before plaintiff's contract was terminated. While Dr. Byrne may perform some of the duties that were performed by plaintiff prior to his termination, he is not designated, nor is he compensated, at Medical Director. Another employee assuming the former duties of a terminated employee does not constitute replacement. Lilley v. BTM Corp., 958 F. 2d 746, 752 (6th Cir. 1992). The position of Medical Director was simply terminated by the Hospital.

In addition, plaintiff offers no evidence that a

similarly situated non-protected person was treated better.

[9]

With respect to the termination of his contract rather than Dr. Byrne's contract, plaintiff was required to demonstrate that he and Dr. Byrne were "similarly situated in all respects." Mitchell, 964 F. 2d at 583. However, the evidence before the Court indicates a large disparity in the compensation required under plaintiff's contract and that required under Dr. Byrne's contract. In addition, Dr. Byrne's agreement with the Hospital was on a month-to-month, rather than long term, basis since July, 1992. Thus, Dr. Byrne and plaintiff were not similarly situated in all respects. With respect to the Hospital's decision to enter into a contract with the neonatologist group at St. Vincent Medical Center, plaintiff cannot show that a non-protected person was treated better as this group included members who are Asian-born Indians. Defendant's Exhibit G. Accordingly, the Court concludes that plaintiff

has failed to establish a prima facie case of discriminatory discharge, and the Court need not address the issue of pretext. Defendant is, therefore, entitled to summary judgment on plaintiff's claims of discrimination in violation of Title VII and Section 1981.

Defendant is also entitled to summary judgment as to plaintiff's claims under Section 1983. To succeed in a Section 1983 action, plaintiff must prove that defendant was acting "under color" of state law. See 42 U.S.C. Section 1983. Plaintiff has offered no evidence or argument that defendant, a private hospital, was acting under color of state law.

Plaintiff's fifth cause of action alleges a breach of "verbal assurances and representations that plaintiff would be employed or affiliated with defendant for a minimum period

[10]

of 20 years, or as long as he elected to be so employed,

and would not be terminated without just cause." Complaint Paragraphs 35, 39. Plaintiff argues that such assurances created an implied "umbrella agreement" that overrode the terms of his written agreement. Plaintiff's sixth cause of action is also based upon the same alleged breach of verbal assurances by defendant. Plaintiff alleges that defendant is promissorily estopped from terminating him "by reason of defendant's breach of its representations to plaintiff as stated in plaintiff's fifth cause of action." Complaint Paragraph 41.

In support of his arguments, plaintiff offers his own affidavit wherein he states that, prior to signing the 1987 agreement and prior to and contemporaneous with signing the 1990 agreement, representations were made by defendant that he could work at the Hospital as long as he wanted to work but that the Hospital was required to contract for a specified term due to "bonding requirements." See Supplemental Affidavit of Plaintiff at

Paragraphs 13, 15a, 17, 19, 24. He further states that the relied upon defendant's representations in 1987 by leaving his employment in Minnesota and moving his family to Toledo and again in 1990 by failing to pursue offers from other hospitals in the midwest. Id. at paragraphs 15, 24.

The Court finds, however, that both of plaintiff's claims are barred by the parol evidence rule. The parol evidence rule precludes the introduction of evidence of conversations that occur prior to or contemporaneous with a written contract and which attempt to vary or contradict the terms of said contract. AmeriTrust Co. v. Murray, 20 Ohio

[11]

App. 3d 333, 335 (Cuyahoga Cty. 1984). The parol evidence rule is not a rule of evidence, but is a rule of substantive contract law employed as an aid to judicial interpretation. Ed Schory & Sons, Inc. v. Francis, 75 Ohio St. 3d 433, 440 (1996); American General Finance

v. Beemer, 73 Ohio App. 3d 684, 687 (Allen Cty. 1991). Thus, when a party seeks to enforce an oral argument in preference to a written agreement on the same subject matter, yet having different terms, the parol evidence rule is applicable. Ed Schory & Sons, Inc., 75 Ohio St. 3d at 440. Moreover, under Ohio law, where the contract is a fully integrated agreement, "courts will give effect to the parties' expressed intentions" and "*[i]ntentions not expressed in the writing are deemed to have no existence and may not be shown by parol evidence.*" Construction Interior Sys., Inc v. Marriott Family Restaurants, Inc., 984 F. 2d 749, 754 (6th Cir.), cert. denied 510 U.S. 869 (1993).

In the case sub judice, both of the written contracts signed by plaintiff were fully integrated agreements and were unambiguous as to the term of the contract and conditions under which the contract could be terminated. Thus, plaintiff's attempt to vary the terms of his agreement

with defendant is unavailing. Plaintiff incorrectly relies on Mers v. Dispatch Printing Co., 19 Ohio St. 3d 100 (1985), for the proposition that a promissory estoppel claim is viable even if a fully integrated written agreement exists between the parties. Mers involved an oral employment at will agreement, not a written contract. Furthermore, the alleged promises to Mers came after the initial oral contract of employment. Mers contended that he then relied on the

[12]

promises to his detriment. In the case sub judice, as stated herein, any promises were made prior to the written agreement. Accordingly, defendant is entitled to summary judgment on plaintiff's fifth and sixth causes of action.

The Court also finds plaintiff's attempt to circumvent the parol evidence rule by claiming in his ninth cause of action that defendant fraudulently misrepresented the term of his contract to be unavailing. The 1990

contract clearly states that it was for a term of five years, defendant told plaintiff that it could not contract for longer periods due to certain bonding requirements, plaintiff was represented by counsel during the negotiation of the contract, and plaintiff was told by counsel that the contract could be terminated without cause. Plaintiff had no right to believe that he was actually contracting for a longer term or to rely on oral representations in contravention of those set forth in the written agreement. On these facts, a reasonable factfinder could not conclude that defendant fraudulently misrepresented the term of the contract. defendant is, therefore, entitled to summary judgment on plaintiff's fraud claim.

Plaintiff's seventh cause of action alleges that "plaintiff was employed with defendant under a written agreement" and that "defendant had a duty under said contract to not terminate plaintiff without just cause." Complaint, Paragraphs 44-45. However, the 1990

agreement, by its express terms, gave either party the right to terminate the contract without cause or penalty at the end of the fourth term year by giving a written six-month notice of termination. It is undisputed

[13]

that defendant terminated the contract at the end of the fourth year and gave adequate notice of the termination. Thus, defendant is entitled to summary judgment on this claim. Insofar as plaintiff argues that this claim states a claim for breach of an oral contract, defendant is also entitled to summary judgment as indicated above.

Plaintiff's eighth cause of action alleges that the defendant requested that, in addition to the duties he was retained to perform, he develop and upgrade defendant's Department of Neonatology to a Level II status. He further alleges that he accomplished the Level II certification "all to defendant's benefit, among other benefits to defendant" and that defendant was unjustly

enriched thereby. Complaint Paragraphs 47-48. Plaintiff argues that he was not paid additional monies over and above his salary for his endeavors in obtaining a Level II status or for instituting a sleep apnea program at the Hospital.

Unjust enrichment is a quasi-contract which occurs when a benefits has been conferred by a plaintiff on a defendant, the defendant has knowledge of the benefit, and the circumstances are such that it would be unjust for the defendant to retain the benefit without compensation. Hambleton v. R. G. Barry Corp., 12 Ohio St. 3d 179, 183 (1984). In the case sub judice, assuming plaintiff has satisfied the first two elements set forth above, he has failed to demonstrate circumstances such that a reasonable factfinder could find him entitled to recovery on a theory of unjust enrichment.

[14]

Plaintiff's contract with defendant provides that

the position of Medical Director was established "to assist the Hospital's neonatal nursery unit . . . and its Department of Pediatrics . . . to better provide services to its patients." Defendant's Exhibit E, Paragraph A. Although the contract does not specifically place upon plaintiff the responsibility of obtaining Level II certification or instituting the sleep apnea program, the Court finds that the language of the contract is general enough to encompass these activities. This finding is buttressed by plaintiff's deposition testimony that he knew that obtaining a Level II status in Ohio was largely political and that he told the Hospital that he would do his job as Director of Neonatology, but the Hospital would have to do its political "stuff" to get the Level II. Plaintiff Depo. at 59. There is no indication that plaintiff was involved in the political aspect of obtaining Level II certification. Moreover, plaintiff admits that obtaining the certification was the result of the efforts of many people,

and not of his efforts alone. In any event, working towards obtaining Level II certification and instituting a sleep apnea program falls within the description of the purpose of the position of Medical Director to assist the hospital "to better provide services to its patients." Plaintiff does not contend that he was not paid the salary to which he agreed while acting as Medical Director. On these facts, the Court finds defendant is entitled to summary judgment on plaintiff's claim of unjust enrichment.

Next, defendant argues that thee is no admissible evidence to support plaintiff's claim of defamation set forth

[14]

in his tenth cause of action. Defendant testified in his deposition that evidence supporting this claim was "mostly by hearsay from the nurses and other people." Plaintiff Depo. at 237. Paragraphs 28 and 29 of plaintiff's affidavit

relied upon by plaintiff provide no support for the defamation claim. The Court also finds plaintiff's general reference to nearly sixty pages of deposition testimony of Sally McNichols[4] insufficient to satisfy his burden of "set[ting] forth specific facts showing that there is a genuine issue for trial." Anderson, 477 U.S. at 250. The Court is not required to scour the record in search of an issue of material fact. See Guarino v. Brookfield Twp. Trustees, 980 F. 2d 399, 405 (6th Cir. 1992)[5]

The elements of a defamation claim include a false and defamatory statement, an unprivileged publication to

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4 The Court assumes that Edna McNichols and Sally McNichols are one and the same.

5 Likewise, plaintiff's general reference throughout his opposition and surreply briefs to deposition testimony of witnesses, some of which consist of multiple volumes, and to plaintiff's 33 page affidavit is insufficient to create an issue of material fact as to any of plaintiff's claims where he has failed to direct the Court to a specific portion of the deposition or affidavit.

a third party, fault on the part of the publisher, and harm caused by the publication. See Akron-Canton Waste Oil, Inc v. Safety-Kleen Oil Serv., Inc., 81 Ohio App. 3d 591, 601 (Summit Cty. 1992). As plaintiff has set forth no evidence of a defamatory statement made to a third party, defendant is entitled to summary judgment on this claim.

[15]

Finally, plaintiff alleges in his eleventh cause of action that defendant entered into a contractual arrangement with St. Vincent's Medical Center to provide personnel to cover for Dr. Byrne when he is unavailable. He further alleges that this arrangement resulted in a restraint of trade and/or a monopolization of neonatal services by defendant and St. Vincent's Medical Center which restricted his ability to work as a neonatologist at defendant Hospital in violation of federal and state antitrust laws. Defendant argues that he evidence does not support a monopolization claim and that plaintiff has

no standing to maintain his antitrust claims as he has not suffered an antitrust injury.

With respect to the monopolization claim, the evidence indicates that defendant entered into a-contract with a professional corporation comprised of neonatologists to provide coverage at the Hospital in Dr. Byrne's absence, and not with St. Vincent's Medical Center. Moreover, plaintiff testified that there are four hospitals in Toledo that maintain neonatal units. Thus, the Court agrees that the record provides no support for plaintiff's monopolization claim.

Plaintiff contends, however, that his claim is primarily directed to the prohibition of contracts in restraint of trade found in Section 1 of the Sherman Act, 15 U.S.C. Section 1. In order to have standing to prosecute this antitrust claim, plaintiff must show more than that defendant's conduct caused him injury. Balaklaw v. Lovell, 14 F. 3d 793, 797 (2d Cir. 1994). As

stated by the Supreme

[17]

Court in Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U. S. 477, 489 (1977):

> Plaintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of the anticompetitive acts made possible by the violation.

In looking at the cause of a claimed injury, the Court is instructed "to look at whether the conduct was anticompetitive, and if it was not anticompetitive, standing is not shown." HyPoint Technology, Inc. v. Hewlett-Packard Co., 949 F. 2d 874, 877 (6th Cir. 1991). Similarly, under Ohio's antitrust statutes, contained in Ohio Revised Code Chapter 1331, plaintiff's injury "must stem from a competition-reducing aspect or effect of

defendant's behavior." Schweizer v. Riverside Methodist Hospital, 108 Ohio App. 3d 539, 544 (Franklin Cty. 1996).

The relevant markets arguably affected by the contract granted to the neonatologist group rather than to plaintiff are (1) the consumers of neonatal services, and (2) the providers of neonatal services. From the consumers' point of view, it does not appear, and plaintiff does not contend, that the market has changed. According to the deposition testimony of plaintiff, he remained on the staff of several Toledo hospitals after his contract with defendant was terminated and the new contract was granted to the neonatologist group. Even though plaintiff was no longer

[18]

under contract with defendant, consumers were still afforded the same mix of neonatologists as they were previously.

With respect to the providers of neonatal services, plaintiff testified that the market in which neonatologists compete for jobs is nationwide. Plaintiff was, in fact, recruited from a hospital in Minnesota at the time of his original contract in 1987. After termination of his contract with defendant, he practiced at hospitals in Dearborn and Southfield, Michigan; and, in 1996, he began practicing at a hospital in Detroit. Although plaintiff argues that he was injured by defendant's contract with the neonatologist group because it kept him "from entering the field" of neonatology, there is no evidence to support this argument. The Court finds that competition in the market in which neonatologists compete for jobs was unhampered by the contract at issue. As plaintiff has failed to demonstrate the requisite antitrust causation for any injury he might have sustained, he lacks antitrust standing under both federal and state law to challenge defendant's actions. See HyPoint Technology, Inc., 949 F. 2d at 879;

Schweizer, 108 Ohio App. 3d at 544.

THEREFORE, for the foregoing reasons, good cause appearing, it is

ORDERED that defendant's motion for summary judgment be, and hereby is, GRANTED

/s/ John W. Potter

Sr. United States District Judge

3. NOTICE OF APPEAL TO U. S. COURT OF APPEALS

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

Athi Narayan

Docket Number 3:95CV 7366

v Judge Potter
(District Court Judge)

St. Charles Hospital

Amended
NOTICE OF APPEAL

Notice is hereby given that Plaintiff (Appellant) appeals to the United States Court of Appeals for the Sixth Circuit from the (X) Judgment (____) Order (____) Other (Specify) Summary Judgment Order Dismissing case entered in this action on Dec. 20, 1996.

(Date)

George R. Royer
(Counsel for Appellant)

Address 316 N. Michigan
Suite 416
Toledo, Ohio 43624

Phone: (419) 241-6612

Date January 17, 1997

4. FEDERAL CIVIL RULE 56 (C)

Federal Civil Rule 56(C), which states in part as follows:

> " . . . A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only therefrom, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in his favor. . ."

5. 42 U.S.C. SECTION 2000(e)(2)

42 U.S.C. 2000e-2 provides in relevant part as follows:

> Employers. It shall be unlawful employment practice for an employer:
>
> 1. to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, condition, or privileges of employment because of such individual's race, color, religion, sex, or national origin; or
>
> 2. to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

6. SIXTH AMENDMENT TO U. S. CONSTITUTION

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him, to have compulsary process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

7. CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Appendix was mailed to Rolf H. Scheidel, Attorney for Respondent, 1000 Jackson Street, Toledo, Ohio 43624, this 30 day of Nov., 1998.

John G. Rust
Attorney for Petitioner
4628 Lewis
Toledo, OH 43612
(419) 476-0347